A

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor

B

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1104 OF 2004
RAMLY ALI J
24 FEBRUARY 2006

C

Civil Procedure — Summary judgment — Triable issues — Action against defendants was for joint and several liability under guarantee — Statement of claim did not state or inserted the words 'jointly and severally' — Judgment in default entered against second defendant — Whether plaintiff's right on cause of action against defendants either jointly or severally survived

D

Civil Procedure — Summary judgment — Triable issues — Credit facility agreements not stamped as required under s 52(1) Stamp Act 1949 — Whether non-stamping of credit facility agreements adversely affected plaintiff's case against first defendant

E

Civil Procedure — Summary judgment — Triable issues — Jurat — Failure to complete jurat — Whether affidavit inadmissible

F

Civil Procedure — Summary judgment — Triable issues — Service of notice of demand by prepaid post to the address last known to the plaintiff or as stated in the guarantee — Presumption that notice of demand reached the first defendant in the course of post — Whether there is duty on plaintiff to ensure that notice of demand after being posted was actually received by the first defendant

G

Civil Procedure — Summary judgment — Triable issues — Whether triable issues raised — Whether a proper case for summary judgment

H

The plaintiff's claim against the defendants was for the sum of RM1,352,229.81 being the amount outstanding under an overdraft facility ('the overdraft facility') together with interest accrued. Pursuant to letters of offer issued by the plaintiff and accepted by Strategy Powerhouse Sdn Bhd as ('the borrower') the plaintiff agreed, inter alia, to grant the overdraft facility to the borrower subject to the terms stated in the said letters of offer. Pursuant to letters of guarantee, as consideration to the plaintiff granting the overdraft facility to the borrower, both the defendants agreed jointly and severally to pay to the plaintiff when demanded, the sum of indebted by the borrower, in the event the borrower fails to repay the said amount. The plaintiff had provided the overdraft facility to the borrower and the facility had been fully

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utilized. Due to the default by the borrower to make repayment of the amount due and owing under the overdraft facility, the plaintiff filed an action in the High Court whereby the borrower was named as first defendant, the first defendant in the present action was named as second defendant and the second defendant in the present action was named as third defendant. The action was subsequently withdrawn against the first and second defendant with liberty to file afresh. Judgment has been obtained against the borrower whereby winding up proceedings was commenced resulting in a winding up order being made against the borrower. The plaintiff refiled the action against the first and second defendants, as guarantor. Judgment in default of appearance was obtained against the second defendant. The plaintiff filed an application for summary judgment under O 14 of the Rules of High Court 1980 against the first defendant. The plaintiff's O 14 application against the first defendant was allowed. The first defendant filed the present appeal to the judge in chambers to appeal against the said decisions of the learned senior assistant registrar which allowed the plaintiff to enter summary judgment against him.

Held, dismissing the appeal:

(1) The plaintiff's claim against both the first and second defendant was based on the letters of guarantee they signed as guarantors to the overdraft facility granted by the plaintiff to the borrower. Both the letters of guarantee carry 'joint and several' liability on both the guarantors. When the letters of guarantee provide for 'joint and several' liability what they meant was that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against them individually. In such situation, the plaintiff can proceed with one action against both of them at the same time or two separate actions against both of them individually. The effect is that, either way, the cause of action against any one of them is not discharged if judgment is entered against the other one. The fact that the said judgment in default against the second defendant as well as the prayer in the plaintiff's statement of claim did not state or inserted the words 'jointly and severally' did not in any way change the position. The plaintiff's right on the cause of action against both of the defendants either jointly or individually (ie severally) survived. The plaintiff can always proceed against the first defendant even though a final judgment in default had been entered against the second defendant (see paras 31–32).

(2) This issue raised by the first defendant was not a triable issue. As laid down by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, this issue was solely a question of law without reference to any disputed facts. If the legal point was understood and the court was satisfied it was unarguable, the court was not prevented from granting a summary judgment merely because the question of law was at first blush of some complexity and therefore took a little longer to understand. To decide otherwise, in the circumstances of the present case, may amount to total disregard of the real intention of the parties expressly provided in the guarantee agreements and may also be contrary to commercial reality in the banking industry (see para 35).

(3) What the plaintiff has to do was clearly defined in the guarantee. In this case, cl 16, ie to send the notice of demand by prepaid post to the address last known to the plaintiff or as stated in the guarantee itself. This has been done twice. Therefore, the presumption is that the said notice of demand reached the first defendant in the course of post. It was not the plaintiff's duty to ensure that the said notice after being posted was actually received by the first defendant. The guarantee did not stipulate that obligation on the part of the plaintiff. Mere denial by the first defendant to the effect that he did not receive the notice was insufficient to rebut the said presumption, particularly in the present case, where the first defendant did not at any time dispute the correctness of the address in the notice of demand as well as on the envelope, the court was satisfied that this issue raised by the first defendant was not a triable issue (see para 39).

(4) The court may use and accept the affidavits as the failure to insert the title of the action in the jurat was of very little significance or consequence as the jurat was not a separate document from the affidavit sworn. Therefore, the court was satisfied that this particular issue raised by the first defendant was without merit and was not a triable issue (see paras 46–47).

(5) Even though the credit facility agreements were not to be admitted as evidence as it was not stamped as required under s 52 of the Stamp Act 1949, that did not adversely affect the plaintiff's case against the first defendant. There were other sufficient facts or evidence as admitted and not disputed by the first defendant, to help the plaintiff to prove that the overdraft facility was granted to and utilised by the borrower and was duly guaranteed by both the first and second defendants. The borrower was wound up as a result of proceeding commenced by the plaintiff. If no loan was obtained by the borrower, then surely it would not be wound up. There was also evidence of Directors Circular Resolution of the borrower signed by both the first and second defendants confirming that the overdraft facility has been granted and accepted by the borrower (see paras 51– 52).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk jumlah RM1,352,229.81 yang merupakan baki jumlah di bawah kemudahan overdraf ('kemudahan overdraf') berserta faedah yang terakru. Menurut surat tawaran yang dikeluarkan oleh plaintif dan diterima oleh Strategy Powerhouse Sdn Bhd ('peminjam')seperti yang plaintif setuju, antara lain, untuk memberikan kemudahan overdraf kepada peminjam, kedua-dua defendan bersetuju secara bersama dan berasingan untuk membayar kepada plaintif apabila dituntut, jumlah yang terhutang oleh peminjam, jika peminjam gagal untuk membuat bayaran balik jumlah yang tertunggak dan perlu dibayar di bawah kemudahan overdraf itu. Plaintif telah memberikan kemudahan overdraf kepada peminjam dan kemudahan itu telah digunakan sepenuhnya. Akibat kegagalan peminjam untuk membuat bayaran balik jumlah yang tertunggak dan perlu dibayar di bawah kemudahan overdraf itu, plaintif telah memfailkan satu tindakan di Mahkamah Tinggi di mana peminjam dinamakan sebagai defendan pertama, defendan pertama dalam tindakan semasa dinamakan

sebagai defendan kedua dan defendan kedua dalam tindakan semasa dinamakan sebagai defendan ketiga. Tindakan tersebut telah ditarik balik terhadap defendan pertama dan kedua agar dapat difailkan baru. Penghakiman telah diperoleh terhadap peminjam di mana prosiding penggulungan telah dimulakan yang menyebabkan satu perintah penggulungan dibuat terhadap peminjam. Plaintif telah memfailkan semula tindakan terhadap defendan pertama dan kedua, sebagai penjamin. Penghakiman ingkar kehadiran telah diperoleh terhadap defendan kedua. Plaintif telah memfailkan satu permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan pertama. Permohonan A 14 plaintif terhadap defendan pertama dibenarkan. Defendan pertama memfailkan rayuan semasa kepada hakim dalam kamar untuk merayu terhadap keputusan penolong kanan pendaftar yang bijaksana yang telah membenarkan plaintif memasuki penghakiman terus terhadap beliau.

Diputuskan, menolak rayuan tersebut:

(1) Tuntutan plaintif terhadap kedua-dua defendan pertama dan kedua adalah berdasarkan surat-surat jaminan yang mereka telah tandatangani sebagai penjamin kepada kemudahan overdraf itu yang diberikan oleh plaintif kepada peminjam. Kedua-dua surat jaminan mempunyai liabiliti 'joint and several' ke atas kedua-dua penjamin. Apabila surat-surat jaminan memperuntukkan liabiliti 'joint and several' apa yang dimaksudkan adalah bahawa plaintif mempunyai satu kausa tindakan terhadap kedua-dua defendan sebagai penjamin bukan sahaja untuk tindakan bersama terhadap mereka dan juga untuk tindakan berasingan terhadap mereka secara individu. Kesannya adalah, mana-mana satupun, kausa tindakan terhadap salah satu daripadanya tidak dilaksanakan jika penghakiman dimasuki terhadap salah satu daripadanya. Hakikat bahawa penghakiman ingkar terhadap defendan kedua dan juga permohonan dalam penyataan tuntutan plaintif tidak menyatakan atau memasukkan perkataan-perkataan 'jointly and severally' tidak dalam apa carapun mengubah keadaan. Hak plaintif dalam kausa tindakan terhadap kedua-dua defendan sama ada secara bersama atau individu (iaitu berasingan) masih kekal. Plaintif boleh meneruskan terhadap defendan pertama meskipun penghakiman ingkar yang muktamad telah dimasuki terhadap defendan kedua (lihat perenggan 31–32).

(2) Persoalan yang ditimbulkan oleh defendan pertama bukan satu persoalan yang tidak boleh dibicarakan. Sepertimana yang diputuskan oleh Mahkamah Agong dalam *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, persoalan ini semata-mata satu persoalan undang-undang tanpa rujukan kepada apa-apa fakta yang dipertikaikan. Jika aspek perundangan difahami dan mahkamah berpuas hati ia tidak boleh dipertikaikan, mahkamah tidak boleh dihalang daripada memberikan satu penghakiman terus hanya kerana persoalan undang-undang pada mulanya kompleks dan oleh itu mengambil masa untuk difahami. Untuk memutuskan sebaliknya, dalam keadaan kes semasa, boleh membentuk kepada penafian kepada niat sebenar pihak-pihak yang dinyatakan dalam perjanjian jaminan dan boleh juga bertentangan dengan realiti komersial dalam industri perbankan (lihat perenggan 35).

(3) Apa yang plaintif perlu lakukan telah ditafsirkan dengan jelas dalam jaminan tersebut. Dalam kes ini, kl 16, iaitu untuk menyampaikan satu notis tuntutan melalui pos pra bayar kepada alamat terakhir yang diketahui kepada plaintif atau sebagaimana yang dinyatakan dalam jaminan itu sendiri. Ini telah dilakukan dua kali. Oleh itu, andaiannya adalah bahawa notis tuntutan tersebut dikatakan telah sampai kepada defendan pertama melalui pos. Ia bukan kewajipan plaintif untuk memastikan bahawa notis tersebut selepas dipos telahpun diterima oleh defendan pertama. Jaminan itu tidak menetapkan tanggungjawab itu di pihak plaintif. Penafian semata-mata oleh defendan pertama bahawa beliau tidak menerima notis tersebut tidak memadai untuk mematahkan andaian itu, terutamanya dalam kes semasa, di mana defendan pertama tidak pada bila-bila masa mempertikaikan kesahihan alamat dalam notis tuntutan itu dan juga pada sampul suratnya, mahkamah berpuas hati bahawa persoalan yang ditimbulkan oleh defendan pertama ini bukan satu persoalan yang perlu dibicarakan (lihat perenggan 39).

(4) Mahkamah boleh menggunakan dan menerima afidavit-afidavit itu kerana kegagalan untuk memasukkan tajuk tindakan dalam jurat tidaklah penting sangat atau memberi kesan yang ketara kerana jurat bukan satu dokumen yang berasingan daripada afidavit yang diangkat sumpah. Oleh itu, mahkamah berpuas hati dengan persoalan khusus ini yang telah ditimbulkan oleh defendan pertama tanpa merit dan bukanlah satu persoalan yang perlu dibicarakan (lihat perenggan 46–47).

(5) Meskipun perjanjian-perjanjian kemudahan kredit tidak dimasukkan sebagai keterangan kerana ia tidak distemkan seperti yang dikehendaki di bawah s 52 Akta Setem 1949, ia tidak menjejaskan kes plaintif terhadap defendan pertama. Terdapat fakta atau keterangan lain yang memadai seperti yang telah dimasukkan dan tidak dipertikaikan oleh defendan pertama, untuk membantu plaintif membuktikan bahawa kemudahan overdraf itu telah diberikan untuk dan digunakan oleh peminjam dan telah diberi jaminan oleh kedua-dua defendan pertama dan kedua. Peminjam telah digulungkan akibat prosiding yang telah dimulakan oleh plaintif. Jika tiada pinjaman diberikan oleh peminjam, maka sudah pasti ia tidak akan digulungkan. Terdapat juga keterangan Resolusi Pekeliling Pengarah peminjam yang ditandatangani oleh kedua-dua defendan pertama dan kedua mengesahkan bahawa kemudahan overdraf telah diberikan dan diterima oleh peminjam (lihat perenggan 51– 52).]

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6540–6613.

Cases referred to

Airmartech Corp (M) Sdn Bhd v Equaltra (M) Sdn Bhd [2001] 2 MLJ 266 (refd)
Asia Commercial Finance (M) Bhd v Island Rental Sdn Bhd [2002] 2 CLJ 741 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Hong Leong Bank Bhd v Porcetakan Melati Sdn Bhd & Ors [2002)] 4 MLJ 70 (refd)
Parr v Snell & Ors [1923] 1 KBD 1 (refd)

Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh [2001] 5 MLJ 317 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 13 r 1(1), O 14, O 41 rr 1(7), (8), 4
Stamp Act 1949 s 52

Nordina Mohd Tajudin (Anad & Noraini) for the plaintiff.
Douglas Chai (Lim & Hob) for the defendant.

Ramly Ali J:

[1] The first defendant is appealing against the learned SAR's decision dated 26 September 2005 which allowed the plaintiff to enter summary judgment against the him.

BRIEF FACTS

[2] The plaintiff's claim against the defendants is for the sum of RM1,352,229.81 as at 8 June 2004 being the amount outstanding under an overdraft facility together with interest accrued from 9 June 2004 upon the contract rate calculated at 3.5%pa on the plaintiff's base lending rate (or such other rate as may be varied from time to time) until the date of full settlement.

[3] Pursuant to letters of offer dated 12 September 2001 and 10 September 1997 issued by the plaintiff and accepted by Strategy Powerhouse Sdn Bhd ('the borrower'), the plaintiff agreed inter alia to grant an overdraft facility in the sum of RM800,000 to the borrower subject to the terms stated in the said letters of offer.

[4] Pursuant to letters of guarantee dated 17 September 1996 and 19 September 1997, as consideration to the plaintiff granting the overdraft facility to Strategy Powerhouse Sdn Bhd, both the defendants agreed jointly and severally to pay to the plaintiff when demanded, the sum of indebted by Strategy Powerhouse Sdn Bhd, in the event fails to repay the said amount.

[5] The plaintiff has provided the overdraft facility to Strategy Powerhouse Sdn Bhd and the facility had been fully utilized. Due to the default by Strategy Powerhouse Sdn Bhd to make repayment of the amount due and owing under the overdraft facility, the plaintiff filed an action in the High Court of Kuala Lumpur vide Suit No D1–22–714 of 2004 whereby Strategy Powerhouse Sdn Bhd was named as first defendant, the first defendant in this present action was named as second Defendant and the second Defendant in this present action was named as third defendant.

[6] Suit No D1–22–714 of 2004 was withdrawn against the first and second defendant on 15 July 2004 with liberty to file afresh. Judgment has been obtained on 25 July 2002 against Strategy Powerhouse Sdn Bhd whereby winding up proceedings

was commenced resulting in a winding up order being made against Strategy Powerhouse Sdn Bhd. The plaintiff refiled the present action on 4 August 2004 against the first and second defendants, as guarantor.

[7] Judgment in default of appearance was obtained against the second defendant on 25 January 2005. On 10 March 2005, the plaintiff filed application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against the first defendant.

[8] On 26 September 2005, the plaintiffs O 14 application against the first defendant was allowed with costs. On 5 October 2005, the first defendant filed the present notice of appeal to the judge in chambers to appeal against the said decisions of the learned SAR.

FIRST DEFENDANT'S SUBMISSION

[9] The first defendant submitted that summary judgment should not have been allowed in the present action as there are several issues to be tried.

[10] The issues raised are as follows:

(i) that the plaintiff has no cause of action to obtain summary judgment against the first defendant;

(ii) that the plaintiffs action is premature as the plaintiff has not sent any letters of demand to the first defendant, to demand for the outstanding amount owed by Strategy Powerhouse Sdn Bhd;

(iii) that all the plaintiff affidavits are defective as the plaintiff failed to insert the complete jurat, ie the title of the action was not inserted into the jurat - failing to comply with O 41 r 1 (7) and (8) of the RHC; and

(iv) that first defendant is not liable to pay the plaintiff for the sum owed by Strategy Powerhouse Sdn Bhd, as the plaintiff has not proved that it has provided loan to Strategy Powerhouse Sdn Bhd.

FINDINGS OF THE COURT

[11] The law of summary judgment under O 14 of the RHC is settled. The principle to be applied has been laid down in so many authorities. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the Supreme Court has laid down comprehensive principles to be adopted in cases involving application for summary judgment under O 14. The relevant principles are as follows:

(i) In an application under O 14, court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

(ii) Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently in probable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

(iii) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because the question of law is a first blush of some complexity and therefore takes a little longer to understand.

[12] Based on the principles, the court will analyse all the issues raised by the first defendant in the present action and to be satisfied that these issues are triable issues, ie determination of the issues can only be made after full trial of the action. If the issues can be determined at this stage of the proceedings by way of affidavits without having to go for full trial, then, these issues cannot be used as grounds to set aside the summary judgment granted to the plaintiff by the learned SAR. Also, if the issue raised is solely a question of law or interpretation of law, then the court should exercise its discretion under O 14 to grant summary judgment to the plaintiff. Also, if the facts are clear and undisputed then, the court can decide on these facts without having to go for full trial. It is a common practice that defendant in O 14 applications will raise as many issues as possible for the purpose of impressing upon the court that there are issues to be tried and therefore summary judgment is not appropriate. In order for the court to exercise its discretion judicially in an O 14 application, the court must analyse and scrutinise all the relevant affidavits, contemporary documents and other statements as well as submissions by counsels, to see whether issues raised are really triable issues.

[13] Based on the above principles, the court shall now deal with the issues raised by the first defendant in the present action, to determine whether those issues or any one of them are really triable issues.

FIRST ISSUE: THAT THE PLAINTIFF HAS NO CAUSE OF ACTION TO OBTAIN SUMMARY JUDGMENT AGAINST THE FIRST DEFENDANT.

[14] On this issue, the first defendant contended that the plaintiff has no cause of action against the first defendant in view of the fact that the plaintiff had already obtained judgment in default of appearance against the second Defendant who was also a guarantor to the overdraft facility on 25.1.2005. The first defendant contended that the said judgment in default was entered on "joint basis" against the second Defendant as opposed to "joint and several" basis and thus the said judgment has clearly destroyed the remedy against the first defendant.

[15] The first defendant admitted that the first and second Defendants signed the "joint and several" guarantees dated 17 September 1996 and 19 September 1997, to act as sureties for the repayment on demand of the overdraft facilities in question. However the first defendant contended, that in the said judgment in default against the second defendant, the plaintiff has omitted to insert the words 'jointly and severally'. Also, there was no such insertion in the prayer to the statement of claim. On that ground the first defendant argued that the plaintiff has elected to pray judgment which is to be obtained against all the defendants on 'joint basis' but not on 'joint and several' basis. On that that ground the first defendant argued that the said judgment in default, being on 'joint basis' has destroyed the cause of action or remedy against the first defendant. The first defendant was relying on the authorities in *Parr v Snell & Ors* [1923] 1 KBD 1 (English Court of Appeal); and two Malaysian High Court decisions in *Asia Commercial Finance (M) Bhd v Island Rental Sdn Bhd* [2002] 2 CLJ 741; and *Hong Leong Bank Bhd v Porcetakan Melati Sdn Bhd & Ors* [2002)] 4 MLJ 70 (both by the same judge: Kamalanathan Ratnam J).

[16] The first defendant further argued that since the plaintiff has failed to make any necessary attempts to amend the statement of claim and also the judgment in default dated 25 January 2003 on or before the hearing of the O 14 application before the learned SAR, therefore it follows that the court has no power to give an order beyond what have been prayed for by the plaintiff in its statement of claim (namely to allow the plaintiff enter a judgment on a 'joint and several" basis against the second defendant) and/or for the court to treat the said judgment in default entered against the second Defendant as a judgment entered on 'joint and several' basis.

[17] It is not disputed that in both the letters of guarantee dated 17 September 1996 and 19 September 1997 signed by both the first and second Defendant, both of them 'jointly and severally' guaranteed and agreed to pay to the plaintiff when demanded, the sum indebted by Strategy Powerhouse Sdn. Bhd. to the plaintiff. The title for the letters of guarantee is 'JOINT AND SEVERAL GUARANTEE'. The preamble to the letters of Guarantee clearly provides — 'we the undersigned, Chan Kim Shin (NRIC: 1321809(B) and Mukhriz bin Mahathir (NRIC: A 0000999/B) jointly and severally guarantee payment on demand...'

[18] It is also not disputed that the plaintiff in its prayer to the statement of claim has not inserted the words 'jointly and severally' or 'secara bersama dan berasingan'. The prayer only states: 'Dengan itu plaintif menunfut terhadap defendan pertama dan defendan kedua untuk...' (without the words 'secara bersama dan berasingan').

[19] It is also not disputed that in the said judgment in default dated 25 January 2005 against the second defendant, the words 'secara bersama dan berasingan' are not inserted. The said judgment only states: '... tiada kehadiran telah dimasukkan oleh defendant kedua dalam tindakan ini adalah Pada Hari ini dihakimkan terhadap defendan kedua bahawa defendan kedua hendaklah membayar kepada plaintif yang berikut...'

[20] This issue is solely a question of law. The facts related to this issue are not disputed. the court has to determine whether this issue is a triable issue or not for the purpose of the present appeal. The question is whether the plaintiff has lost its cause of action or remedy against the first defendant in view of the fact that a judgment in default has been obtained against the second Defendant earlier (on 25 January 2005) as alleged by the first defendant.

[21] The first defendant cited the case of *Parr v Snell & Ors* as authority to support his contention. In that case, it was held that if there was an action which was brought by a plaintiff against three joint contractors, for damages for breach of an agreement and if the plaintiff obtained an interlocutory judgment for damages against two out of the three defendants on joint basis, then the cause of action against the third contractor will cease to exist. The above decision was adopted and followed by RK Nathan J in *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* and *Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd & Ors* — both of Penang High Court). In both the cases (*Asia Commercial Finance* and *Hong Leong Finance*) the plaintiff brought an action against the guarantors, the vital words 'jointly and severally' were missing from the final prayer sought by the plaintiff as well as in the judgment granted earlier to some of the defendants.

Parr v Snell is an action against three contractors, for damages for breach of an agreement, the plaintiff obtained an interlocutory judgment for damages, to be assessed, against two of the defendants in default of defence. the plaintiff then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default.

[22] The facts of that case (*Parr v Snell*) are as follows:

> In November 1919, the plaintiff Parr saw the following advertisement in the *Daily Telegraph*: 'Secretary required in an established motor manufacturing company. Must invest 500. Excellent opportunity for the right man. Commencing remuneration 350 per annum. In addition to dividends on investment. Splendid prospects.'
>
> Having answered the advertisement he received a reply from the Kensington Light Car, Ld, and entered into negotiation with the defendants JS Snell, R Saxon Snett, and DN Quertier who stated themselves to be directors of the company.
>
> On 8 January 1920, the plaintiff wrote agreeing to accept the position of secretary to the company, and on 17 January, the defendant JS Snell wrote to him confirming an arrangement whereby the plaintiff was to act as Assistant Secretary to the company for four weeks before becoming a official secretary at 350. a year, subject to his investing 500. in the company. On 1 February 1920, an agreement was executed whereby the plaintiff was appointed secretary.
>
> On 9 February, shares in the company to the nominal value of 500. were allotted to the plaintiff for which he paid by cheque, and the following undertaking in writing was given to him: 'We JS Snell, R Saxon Snell and DN Quertier hereby undertake and agree with GC Parr, Secretary of the Kensington Light Car, Ld., that upon his relinquishing his position as Secretary to the Kensington Light Cart, Ld., if he shall so desire, shall be purchased from his by a person, either appointed by us or through GC Parr, suitable to fulfill the position vacated by GC Parr, or by persons delegated by us. At a minimum rate of 1. per share, or if the market value of the shares be higher than 1. per share, then shall such shares be purchased from GC Parr at their market value. Signed: JS Snell, R Saxon Snell, DN Quertier.

A the plaintiff having commenced his duties as Secretary, discovered that the company was a fraudulent concern promoted by the Defendants Snell and that no business was being done by it. The defendant Quertier had been entrapped in a similar manner, and induced to invest 500. in shares upon being appointed mechanics at a salary of 2501. a year, and director at 100. a year. Having charged the Snells with fraud he was dismissed and resigned his office of director. the plaintiff then brought this action against the Snells and Quertier
B claiming 500. as the agreed purchase price of his scares in the company, or, in the alternative, 5001. damages for breach of the undertaking of 9 February.

On 4 May 1921, the plaintiff signed interlocutory judgment against the two Snells, who had disappeared without putting in any defence, for damages to be assessed. The Master afterwards assessed them at 5161. 12s. 3d., and final judgment was entered for this sum. the plaintiff then proceeded with the action against Quertier, who pleaded that he was not liable
C on the agreement as there was no consideration for his signing It, and contended that it was a joint, and not a joint and several agreement, and the plaintiff having recovered judgment against the Snells the cause of action against Quertier had been merged in the judgment and could not be prosecuted.

D **[23]** The trial court (Shearman J) held that the undertaking of 9 February, was joint and several, that the claim was for a liquidated sum of which that there was a good consideration for the agreement between the plaintiff and Quertier (third defendant). the court therefore gave judgment for the plaintiff as prayed. The third defendant (Quertier) appealed.

E

[24] At the Court of Appeal, Scrutton LJ applied the technical rule of law, ie: that where there are joint contractors if judgment is signed against one the other is discharged. In that situation, the contract is merged in the judgment and therefore the cause of action on the contract is gone.

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[25] Scrutton LJ further held:

The first question here is: is this a joint contract? Because, if it is not, the technical rule does not apply. With great deference to the learned judge, it seems to me reasonably clear that this is a joint contract. The two Snells and Quertier agree that if the secretary relinquishes his position his shares shall be purchased from him by a person either appointed by them,
G or by persons delegated by them. That seems to me to be a contract to find a purchaser approved by the three, and to be clearly a joint and not a several contract. That being so, in this case judgment has been signed against two and the third is discharged under the technical rule in *Kendall v Hamilton*, unless there is some rule or statute which prevents the operation of the old rule.

H

[26] It must be noted that the court of Appeal in that case had made a finding of facts that the relevant contract entered into by the plaintiff and all the three defendants was a joint contract, after taking into consideration the nature of the undertaking given by all of them to the plaintiff. The undertaking in that case is not
I for payment of liquidated amount, as in the present case. The undertaking in that case is to find a purchaser to purchase the plaintiff's shares upon his relinquishing his post as secretary of company. There is no indication or evidence at all to show that the undertaking was given on a 'joint and several' basis, as in our present action. Scrutton LJ provided exception to the rule, ie 'unless there is some rule or statute which prevents the operation of the old rule'.

[27] One of the rules cited by the learned judge is 'Order XIII — relating to judgment signed in default of appearance', where it was held: **A**

> In Order XIII. and In Order XXVII. if It Is a case of a debt or liquidated demand, judgment may be signed against one for default of appearance of default of pleading, and yet the plaintiff may go on and sign judgment against the others. **B**

[28] It is also to be noted that the so a called 'old rule' (as described by Scrutton LJ) still survives (in that case) as to 'that class of case', ie for action for damages or unliquidated demand where the plaintiff is not allowed to sign final judgment against some of the defendants and yet go on against the others or other. Therefore, in that case (*Parr v Snell*) the Court of Appeal had rightly held that since the plaintiff's claim **C** was not a liquidated claim (but for damages or unliquidated claim) the plaintiff cannot proceed against the remaining third defendant after final judgment had been entered against the other two defendants. In that case, the Court of Appeal was satisfied that there was no 'rule of statute' which present the operation of the 'old rule'. **D**

[29] From the above principles, the court understands that the said 'old rule' is applicable only in cases where the contract is not at 'joint contract'. It is not applicable in cases where the contract is based on 'joint and several' liability. The said rule is also not applicable if ':there is some rule or statute which prevent its operation'. **E** This court is also of the view that the said 'old rule' does not apply if there are agreements between the parties to exclude its operation in a particular case.

[30] Back to the present action before this court, the plaintiff's claim against both the first and second defendant is based on the letters of guarantee they signed as **F** guarantors to the overdraft facilities granted by the plaintiff to Strategy Powerhouse Sdn Bhd (where both of them were directors of the company at the material times). Both the letters of guarantee carry 'joint and several' liability on both the guarantors. This was clearly stated in the letters of guarantee. Both the defendants being educated, knew about it. That was the intention of the parties to the contract. The liability is to pay for liquidated claim on demand in the event Strategy **G** Powerhouse Sdn Bhd failed to repay the facility.

> The words 'joint and several' is defined as 'persons who are jointly and severally bound render themselves liable not only to a joint action against them, but also to a separate actions against them individually.'
>
> (see *A Dictionary of Law*, LB Curzon) **H**

[31] When the letters of guarantee provide for 'joint and several' liability what they meant is that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against **I** them individually. In such situation, the plaintiff can proceed with one action against both of them at the same time or two separate actions against both of them individually. The effect is that, either way, the cause of action against any one of them is not discharged if judgment is entered against the other one. The fact that the said judgment in default dated 25 January 1005 against the second defendant as well as

the prayer in the plaintiff's statement of claim do not state or insert the words 'joint and severally' does not in any way change the position. the plaintiff's right on the cause of action against both of the defendants either jointly or individually (ie severally) still survives. the plaintiff can always proceed against the first defendant even though a final judgment in default had been entered against the second defendant.

[32] The second reason why the rule in *Parr v Snell* is not applicable in the present action is that 'there is some rule or statute which prevent the operation of the old rule' as highlighted by Scrutton LJ in his decision. In that case, Order XIII relating to judgment signed in default of appearance has been considered as one of those rules that 'prevent the operation of the old rule'. In the present case before this court, the provisions of O 13 r 1(1) of the RHC provide the same 'prevention' on the operation of the 'old rule'. Order 13 r 1(1) of the RHC provides:

> (1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

[33] This rule is crystal dear — that in claim involving liquidated demand, (as in the present suit) the plaintiff may enter final judgment against the defendant who fails to enter appearance for a sum not exceeding that claimed in the statement of claim in respect of the demand and for costs and at the same time to proceed with the action against the other defendant, if any. A claim is still a claim for a liquidated demand even if it contain an element of interest accruing after the date of the writ at an unspecified rate. This is provided under O 13 r (1)(2) of the RHC, which says:

> (2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason only that part of the claim is for interest accruing after the date of the writ at an unspecified rate, but any such interest shall be computed from the date of the writ to the date of entering judgment at the rate of 8 percent.

[34] On the above considerations, the court is satisfied that this issue raised by the first defendant is not a triable issue. We don't need to go for full trial just to decide on or to determine this issue. As laid down by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail* this issue is solely a question of law without reference to any disputed facts. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. To decide otherwise, in the circumstances of the present case, may amount to total disregard of the real intention of the parties expressly provided in the guarantee agreements and may also be contrary to commercial reality in the banking industry.

SECOND ISSUE: THAT THE PLAINTIFF'S CLAIM IS PREMATURE AS THE PLAINTIFF HAS NOT SENT ANY LETTER OF DEMAND TO THE FIRST DEFENDANT

[35] The first defendant has denied that the plaintiff has sent any letter of demand to him, to demand him of the outstanding amount owed by Strategy Powerhouse

Sdn Bhd. The first defendant claimed that the plaintiff has not proved the service of the letter of demand by sending it through the post in an envelope addressed to the last known address of the first defendant. The first defendant further argued that the plaintiff has failed to state in the list of registered mails acknowledged by the postal department dated 20 July 2004 the full address of the first defendant's last known address (No 43-B, Jalan 2/71, Off Jalan Tun Mohd Fuad, Taman Tun Dr Ismail, 60000 Kuala Lumpur) and what was merely written by the plaintiff in the list was 'TTDI, KL'. Therefore, the first defendant argued that the plaintiff cannot rely on the deeming clause (ie cl 16 of the Joint and Several Guarantee Agreements) to show that it has given sufficient notice to the first defendant that the plaintiff has made demand from the first defendant of the outstanding amount owed by Strategy Powerhouse Sdn Bhd. Therefore, according to the first defendant, since the joint and several guarantee agreements have stipulated that the liabilities of the guarantors are to pay on demand, it flows that the plaintiffs action against the first defendant is premature as the plaintiff has not complied with the condition precedent to sue the first defendant.

[36] Clause 16 of the guarantee agreements states that, 'Any notice or demand hereunder shall be deemed to have been sufficiently given if sent by prepaid letter post to the address last known to the bank is stated hereon... and shall be assumed to have reach us in the course of post' the plaintiff through its solicitors, Tetuan Anad & Noraini had sent a notice of demand dated 15 July 2004 to the first defendant at the address — c/o Strategy Powerhouse Sdn Bhd, No 43-B, Jalan 2/71, Off Jalan Tun Mohd Fuad, Taman Tun Dr Ismail, 60000 Kuala Lumpur. The first defendant did not dispute the correctness of the address. The first defendant complained that the plaintiff has failed to state in the list of registered mails (Kiriman Banyak Barang-Barang Berdaftar) dated 20 July 2004 the full address of the first defendant, but merely states 'TTDI, KL'. the plaintiff exhibited the said list of registered mails in one of its affidavit in support of the application for summary judgment, where it is stated that registered letter No 0422 was sent to 'Mukhriz bin Mahathir — TTDI, KL'. That letter of demand, together with 23 other letters were posted on 20 July 2004. The first defendant is saying that his full address (as stated in the letter and on the envelope) must be stated in the list of registered mains.

[37] Prior to that, the plaintiff had also sent another notice of demand via ordinary post to the first defendant at the same address. In cases of this nature, it is very common that the Defendant always denied having received the notice of demand and therefore claimed that the plaintiff has failed to send one to him, in order to avoid summary judgment being entered against him. By doing so, the defendant is hoping that a triable issue can be raised and the action will go for full trial.

[38] What the plaintiff has to do is clearly defined in the guarantee agreements, in this case, cl 16, ie to send the notice of demand by prepaid post to the address last known to the plaintiff or as stated in the agreements itself. This has been done twice, ie on 14 March 2002 and 20 July 2004. Therefore, the presumption is that the said notice of demand reached the first defendant in the course of post. It is not the plaintiffs duty to ensure that the said notice after being posted, did actually received by the first defendant. The guarantee agreements do not stipulate that obligation on

A the part of the plaintiff. Mere denial by the first defendant to the effect that he did not receive the notice is insufficient to the rebut the said presumption, particularly in the present case, where the first defendant did not at any time dispute the correctness of the address in the notice of demand as well as on the envelope. The list of registered mails dated 20 July 2004 as exhibited by the plaintiff is sufficient in the
B circumstances of this case, to prove that the said notice of demand was actually posted on that date, even though it just states that it was sent to 'Mukhriz bin Mahathir, TTDI, KL'. Therefore, once again, the court is satisfied that this issue raised by the first defendant is not a triable issue.

C THIRD ISSUE: DEFECTIVE AFFIDAVIT — AS THE PLAINTIFF FAILED TO INSERT THE COMPLETE JURAT

[39] The first defendant complained that the plaintiffs affidavits (Nos 1 and 2) to support its application for summary judgment, are defective for not complying with
D the provisions of O 41 r 1(7) and (8) of the RHC, and therefore should be disregarded.

[40] Order 41 r 1(7) provides that every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

E

[41] Order 41 r 1(8) provides that a jurat must be in one of the forms in Form 78.

[42] The first defendant argued that the jurat in both the plaintiffs affidavits are not complete as the title of the present suit is not inserted into the jurat.

F

[43] the court cannot understand how this issue can amount to a triable issue. The first defendant has not submitted on this question as to how this issue is a triable issue. He just said that the issue is a triable issue. That is all.

G **[44]** This is a very technical issue which does not affect or prejudice the interest of the first defendant in the present proceedings. This issue can always be decided and determined at the stage of summary judgment under O 14, without having to go for full trial. Order 1A of the RHC clearly stipulates that 'in administering any of the rules herein the court or judge shall have regard to the justice of the particular case
H and not only to the technical non-compliance of any of the rules herein'. The first defendant cited the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh* [2001] 5 MLJ 317 to support his argument on this issue. It must be noted that the said case was decided in 2001, before the coming into force of O 1A of the RHC which was inserted by the Rules of the High Court (Amendment) 2002 (PU (A) 197/2002) in 2002.

I

[45] In argument, an affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. This is provided under O 41 r 4 of the RHC. In the present case, the court may use and accept the two affidavits as the failure to insert the title of the action in the jurat is of very little

significance or consequence as the jurat is not a separate document from the affidavit sworn (see *Airmartech Corp (M) Sdn Bhd v Equaltra (M) Sdn Bhd* [2001] 2 MLJ 266).

[46] Therefore, the court is satisfied hat this particular issue raised by the first defendant is without merit and in no way it amounts to a triable issue.

FOURTH ISSUE: PLAINTIFF HAS NOT PROVED THAT THE LOAN WAS PROVIDED TO STRATEGY POWERHOUSE SDN. BHD.

[47] On this issue, the first defendant argued that he is not liable to pay the plaintiff for the sum owed by Strategy Powerhouse Sdn Bhd as the plaintiff has not proved that it has provided loan to Strategy Powerhouse Sdn Bhd on the ground that the plaintiff has failed to stamp the two credit facility agreements dated 13 September 1996 and 19 September 1997 respectively as required under s 52 of the Stamp Act 1949. The first defendant argued that the court should disregard the two agreements exhibited by the plaintiff to support its application for summary judgment, and on that score, the first defendant argued that the plaintiff has not prove that it has given loan to Strategy Powerhouse Sdn Bhd.

[48] The first defendant did not dispute that the credit agreements were executed by Strategy Powerhouse Sdn Bhd where both the first defendant and second defendant were directors at the material times. The first defendant did not dispute that both the first and second defendant executed the guarantee agreements in respect of the said overdraft facilities granted to Strategy Powerhouse Sdn Bhd. The first defendant did not dispute that the overdraft facilities were given out and utilized by Strategy Powerhouse Sdn Bhd. The only dispute raised by the first defendant at this stage is that the credit facility agreements were not duly stamped under s 52 of the Stamp Act 1949. The first defendant did not dispute that the guarantee agreements duly executed by them were duly stamped under the said Act.

[49] Section 52(1) of the Stamp Act 1949 provides:

> No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law o consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

[50] The above provisions touch on the question of evidence. It does not in any way render the substantive transaction as void and invalid. Even though the said agreement is not to be admitted as evidence as claimed by the first defendant, that does not adversely affect the plaintiffs case against the first defendant. There are other sufficient facts or evidence as admitted and not disputed by the first defendant as highlighted above, to help the plaintiff to prove that the said overdraft facility was granted to and utilised by Strategy Powerhouse Sdn Bhd and was duly guaranteed by both the first and second defendant, as director of the company.

[51] Strategy Powerhouse Sdn Bhd was wound up pursuant to the judgment obtained on 9 March 2005. If no loan was obtained by Strategy Powerhouse as claimed by the first defendant, then surely it would not be wound up. There is also evidence of Directors Circular Resolution dated 15 September 1997 of Strategy Powerhouse Sdn Bhd signed by both the first and second defendants confirming that the overdraft facility has been granted and accepted by Strategy Powerhouse Sdn Bhd.

[52] This issue must be an 'afterthought' strategy raised by the first defendant to delay the matter as this issue has never been raised in any of his affidavit. This must be a desperate attempt by the first defendant to avoid liability under summary judgment. the court has no hesitation to hold that this particular issue is baseless and without merit. It is not a triable issue at all.

CONCLUSION

[53] Based on the above considerations, the court is satisfied that the first defendant has failed to raised any triable issue. Therefore, the decision of the learned SAR dated 26 September 2005 allowing summary judgment to be entered against the first defendant is hereby confirmed and the first defendant's appeal is dismissed with costs.

Appeal dismissed.

Reported by Peter Ling